Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Departures

MITIGATING CIRCUMSTANCES

U.S. v. Tsosie, No. 93-2145 (10th Cir. Jan. 14, 1994) (Godbold, Sr. J.) (Remanded: Downward departure is permissible for voluntary manslaughter defendant where the victim was having an affair with defendant's wife and died after a fight with defendant. First, the district court properly found, under the totality of the circumstances, that defendant's behavior was an aberration—he had "a long history of continuous employment with the Navajo Tribe, . . . a reputation for being economically supportive of his family, [and he] has not been engaged in any prior criminal activity." Second, the victim's conduct "contributed significantly to provoking Tsosie's offense behavior," having "consisted not merely of having an affair with Tsosie's wife but also of being in a vehicle with Tsosie's wife the day after she took her children away and gave a false excuse about her whereabouts. . . . Further, in the ensuing fight, [the victim] took off his belt and hit Tsosie on the nose with it and actively participated in the affray" that led to his death. Thus, it was proper to consider under § 5K2.10(a) that "the victim was of a greater physical size and strength than the defendant," and the facts distinguish this case from *U.S. v. Desormeaux*, 952 F.2d 182 (8th Cir. 1991), and *U.S. v. Shortt,* 919 F.2d 1325 (8th Cir. 1990). Finally, when defendant saw the victim was seriously injured he went for help, then returned and tried to stop the bleeding. "Rendering aid to a victim is a factor that is not considered by the Guidelines." Remand is required, however, because the district court did not adequately explain the departure from the 41–51-month range to a four-month term in a halfway house.).
See *Outline* at VI.C.1.c and g, 3, and 4.a.

U.S. v. Marcello, 13 F.3d 752 (3d Cir. 1994) (Affirmed: Defendant convicted of structuring bank deposits in order to evade reporting requirements was not eligible for downward departure based on aberrant behavior. "Aberrant behavior must involve a lack of planning; it must be a single act that is spontaneous and thoughtless, and no consideration is given to whether the defendant is a first-time offender. . . . The district court correctly applied this standard and found that some pre-planning was required to deposit $9,000.00 each day over a one-week period of time.").
See *Outline* at VI.C.1.c.

AGGRAVATING CIRCUMSTANCES

U.S. v. Torres-Lopez, 13 F.3d 1308 (9th Cir. 1994) (Remanded: Upward departure for high-speed car chase while transporting illegal aliens was improper. Defendant's flight "was only a few minutes and less than five miles long, . . . was not unusually fast or reckless," and was "within the boundaries of 3C1.2." Also, defendant did not treat the alien passengers in a dangerous or inhumane manner so as to warrant departure under § 2L1.1, comment. (n.8). "In sum, there is nothing here, aside from the bare presence of illegal aliens, to suggest that Torres-Lopez's flight from authority was in any way extraordinary.").
See *Outline* at VI.B.1.b and j.

Offense Conduct

OTHER DEFENDANTS' DRUG QUANTITIES

U.S. v. Carreon, 11 F.3d 1225 (5th Cir. 1994) (Remanded: "We hold today that relevant conduct as defined in § 1B1.3(a)(1)(B) is prospective only, and consequently relevant conduct under § 1B1.3(a)(1)(B) cannot include conduct occurring before the defendant joins a conspiracy." It was therefore improper to count drug quantities trafficked by the conspiracy before defendant joined it. On remand the district court must determine: "1) when Carreon joined the conspiracy . . . , 2) what drug quantities were within the scope of Carreon's conspiratorial agreement . . . , and 3) of these drug quantities, which were reasonably foreseeable—prospectively only—by Carreon." Defendant's knowledge of the conspiracy's prior conduct may be used, but only as "evidence of what Carreon agreed to and what he reasonably foresaw when he joined the conspiracy.").
See *Outline* at II.A.2.

POSSESSION OF WEAPON BY DRUG DEFENDANT

U.S. v. Zimmer, 14 F.3d 286 (6th Cir. 1994) (Remanded: It was error to give drug defendant § 2D1.1(d)(1) enhancement for rifles found in his home. Defendant presented "unrefuted testimony that these rifles were for hunting and were unconnected with the marijuana. . . . The District Court failed to consider that the defendant was charged with a marijuana manufacturing operation. There are no allegations that Zimmer was actively selling the substance from his home. We do not have a situation in which 'drug dealing' was occurring on the premises, during which a weapon might be utilized. None of the weapons were found anywhere near the marijuana." Further, one rifle was disassembled and inoperable, supporting defendant's claim that he was repairing it for a friend, and there was no ammunition in the house for an unloaded second rifle, supporting defendant's assertion that the rifle did not belong to him. "Given the nature of the operation (manufacturing, not dealing), the setting (rural), and the location of the contraband (in basement) away from the weapons, 'it is clearly improbable that the weapon(s) [were] connected with the offense.' U.S.S.G. § 2D1.1, comment.(n.3).").
See *Outline* at II.C.1 and 3.

DRUG QUANTITY

U.S. v. Zimmer, 14 F.3d 286 (6th Cir. 1994) (Remanded: In determining relevant conduct, the district court could not assume defendant produced a certain number of plants in the past based only on defendant's admission that he had grown

marijuana before. "The court's determination that the defendant grew an additional 200 plants is not supported anywhere in the record. The District Court may not 'create' a quantity when there is absolutely no evidence to support that amount. An estimate can suffice, but 'a preponderance of the evidence must support the estimate.' . . . The information and equipment seized in the case clearly demonstrates that the 'sophisticated' indoor growing operation was but a few months old. Thus, the size of defendant's operation at the time of arrest cannot be manipulated to infer a certain amount of past 'success' (25 plants per year) when there exists not a scintilla of evidence to support such a finding. That the defendant grew marijuana during the years prior to his arrest is not in question; he admitted as much. The amount attributed to him by the District Court, however, was created from whole cloth. It is improper . . . to simply 'guess.' The relevant conduct enhancement is therefore reversed and the District Court is directed to resentence defendant based on the actual amount of marijuana seized.").
See *Outline* at II.B.4.d and generally at II.A.1.

Adjustments

Official Victim

U.S. v. Ortiz-Granados, 12 F.3d 39 (5th Cir. 1994) (Affirmed: Enhancement under § 3A1.2(b) for assault on law enforcement officer by a coconspirator was properly given to defendant convicted of drug offenses. Although Application Note 1 to § 3A1.2 indicates there must be a specified "victim" of the offense of conviction, Note 1 should not be applied to subsection (b) because it conflicts with the guideline and accompanying Note 5, both of which were added later.). *Accord U.S. v. Powell*, 6 F.3d 611, 613–14 (9th Cir. 1993) (same, for defendant who assaulted officer during unlawful possession of weapon offense). *See also U.S. v. Gonzales*, 996 F.2d 88, 93 (5th Cir. 1993) (affirmed enhancement where codefendant shot officer).
See *Outline* at I.F and III.A.2.

Obstruction of Justice

U.S. v. Cotts, 14 F.3d 300 (7th Cir. 1994) (Affirmed: Section 3C1.1 enhancement was properly given to defendant who planned to murder a nonexistent informant that undercover agents had blamed for the failure of a drug deal. "The obstruction enhancement is applicable not just to defendants who have actually obstructed justice but also to those who have attempted to do so, . . . and the district court explicitly based [defendant's] enhancement on his attempt, not his success, in obstructing justice. That [defendant] and his coplotters ultimately could not have murdered the fictitious informant does not diminish the sincerity of any efforts to accomplish that end. Futile attempts because of factual impossibility are attempts still the same.").
See *Outline* at III.C.1.

U.S. v. Washington, 12 F.3d 1128 (D.C. Cir. 1994) (Affirmed: Section 3C1.2 enhancement was properly given to defendant who led police on a car chase in an urban area. "In his attempt to escape the police, [defendant] drove in a fast and reckless manner through a series of neighborhood alleys and ended up flipping his car. It was not clearly erroneous for the district court to find that this behavior constituted reckless endangerment during flight.").
See *Outline* at III.C.3.

Violation of Probation

Revocation for Drug Possession

U.S. v. Penn, No. 93-5190 (4th Cir. Feb. 17, 1994) (Ervin, C.J.) (Remanded: Defendant's probation was revoked for drug possession under 18 U.S.C. § 3565(a), subjecting him to imprisonment for "not less than one-third of the original sentence." The district court construed "original sentence" to mean defendant's three-year probation term rather than his 6–12-month guideline range, and sentenced him to 12 months. The appellate court remanded, holding "that the most reasonable interpretation of § 3565(a) is that a person found to have committed a narcotics related violation is to be resentenced to a term of incarceration that is at least one-third but does not exceed the maximum prison term to which the person could have been sentenced" under the Guidelines. Therefore, although defendant could still be sentenced to 12 months, the minimum term required is only 4 months.).
See *Outline* at VII.A.2, summary of *Alese* in 6 *GSU* #5.

Revocation of Probation

U.S. v. Forrester, 14 F.3d 34 (9th Cir. 1994) (Affirmed: Defendant, originally subject to 33–41-month guideline range but given a five-year term of probation after departure, was properly sentenced after revocation to 33 months instead of the 3–9 months called for by § 7B1.4, p.s. "[T]he policy statements of Chapter 7 are not binding, [although] Forrester is correct in arguing that the sentencing court must consider them. . . . Here, the district court considered Chapter 7. In footnote 1 of its order revoking probation it stated that 'even if [it] sentenced Defendant under Chapter 7, the court would not be bound by the 3–9 month range suggested by Defendant. Commentary note 4 to § 7B1.4 provides that, "[w]here the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance) . . . , an upward departure may be warranted."' Having considered the policy statements of Chapter 7, the court was free to reject the suggested sentence range of 3 to 9 months.").
See *Outline* at VII.

Criminal History

Invalid Prior Convictions

U.S. v. Isaacs, No. 92-2068 (1st Cir. Jan. 25, 1994) (Oakes, Sr. J.) (Remanded: The Guidelines, in § 4A1.2, comment. (n.6 & backg'd) (Nov. 1990), do not provide a sentencing court with independent authority to review the validity of a prior conviction. The Constitution may require such review, but "only where the prior conviction is 'presumptively void.' . . . [A] prior conviction is 'presumptively void' if a constitutional violation can be found on the face of the prior conviction, without further factual investigation. . . . Under limited circumstances, however, a conviction may be 'presumptively void' even if a constitutional violation cannot be found on the face of the prior conviction. . . . Where an offender challenges the validity of a prior conviction on 'structural' grounds"—such as deprivation of certain trial rights or judicial bias—"a district court should entertain the challenge whether or not the error appears on the face of the prior conviction." Here, defendant's challenge should not have been heard because there was no facial invalidity and he did not allege a "structural error" in the prior conviction.) (replacing opinion originally issued June 22, 1993, and reported in 5 *GSU* #15).
See *Outline* at IV.A.3, summary of *McGlocklin* in 6 *GSU* #3.